Supreme Court of the United States

NOVEMBER TERM, 1946

No. 703

HYMAN RAPPY,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION AND SUPPORTING BRIEF FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

LOUIS H. SOLOMON,
Attorney for Petitioner.

INDEX

CASES CITED

Statutes Cited

Miscellaneous

Supreme Court of the United States

NOVEMBER TERM, 1946

No. .....

HYMAN RAPPY,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Hyman Rappy, in support of his petition for a writ of certiorari to review the final judgment of the United States Circuit Court of Appeals for the Second Circuit entered November 6, 1946, affirming his conviction for the possession of goods stolen from a foreign shipment knowing same to have been stolen (Title 18, Section 409, U. S. Criminal Code) on March 27, 1946, respectfully shows:

A

Summary Statement

This action was initiated by the filing of an indictment on December 28, 1945 in the United States District Court held in and for the Southern District of New York. The

indictment charged your petitioner with the crime of having in his possession goods stolen from a foreign shipment, knowing such goods to have been stolen. Your petitioner was convicted of the crime charged on March 27, 1946, after a trial before a jury. On March 28, 1946, your petitioner was sentenced to two years imprisonment and fined Five thousand ($5,000.00) Dollars.

Your petitioner and one Essig, were arrested by an agent of the Federal Bureau of Investigation while attempting to sell 1302 Bulova wrist watch movements to one Charles Weinstein, a wholesale jeweler, and one Harold P. Moss, a Government agent posing as a wholesale jeweler.

Government's Contention

The Government contended that the watch movements in question were part of a shipment of Bulova watch movements which disappeared from a dock during the unloading of the carrier vessel; that petitioner knowingly, and in consort with one Essig, attempted to sell these stolen watch movements to various wholesale jewelers.

Petitioner's Contention

Petitioner contends that one Essig, who was indebted to him and whose father had been in the jewelry business, asked petitioner to help him sell the watch movements, offering him a ten per cent profit on the transaction. Petitioner had no knowledge that these movements were stolen.

The Government's witnesses testified that the watch movements found in Essig's possession were similar in style and design to the movements allegedly stolen from the pier. Their testimony that the watch movements

were stolen was based on bills of lading, manifests and truckmen's receipts which were introduced into evidence over objection. No proof was made that the goods allegedly stolen were in the shipment. No proper foundation was laid for the introduction of the shipping documents.

The Government also failed to establish by any competent testimony that the petitioner ever had possession of the alleged stolen movements or that he knew these movements were stolen.

To prove guilty knowledge, the Government attempted to put into evidence a written statement made by its witness, one Moskowitz, a wholesale jeweler, to the effect that petitioner had telephoned him and offered him "hot" movements at $10.00 each. This witness, on the stand, called by the prosecution, could not recall whether your petitioner had used the term "hot", an expression commonly used among thieves to describe stolen, until shown this statement. After cross examination by defendant, this statement was put into evidence over objection.

The jury, during its deliberations, called for this statement, and within a short time thereafter, returned a verdict of guilty with a recommendation of lenience.

Subsequent Proceedings

An appeal was taken to the Circuit Court of Appeals for the Second Circuit. Upon the appeal petitioner contended: (1) That there was no proof that the goods in question were stolen or were in a foreign shipment and the identity of the seized watch movements as being part of a lot of stolen merchandise was not established; (2) that possession of the seized movements by petitioner, within the meaning of the statute, was not proved; (3) that the Moskowitz statement as a post-facto narrative

obtained from a witness in the investigation and preparation of the case and its admission in evidence was prejudicial error requiring reversal of judgment.

These contentions were rejected. This petition is filed within thirty days next after final judgment on November 6, 1946.

B

Statement of the Jurisdiction of This Court

(1) Statutory Provision Believed to Sustain the Jurisdiction.

The jurisdiction of this court is invoked under section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (U. S. Code, Title 28, Section 347a).

(2) The Date of the Judgment to Be Reviewed.

The judgment of the Circuit Court of Appeals for the Second Circuit affirming the conviction of petitioner was entered on November 6, 1946. This petition, with supporting brief and the certified record, are filed within thirty days next after final judgment.

(3) Statement of the Nature of the Case and the Rulings of the Circuit Court of Appeals Bringing the Case Within the Jurisdiction of this Court.

The nature of the case (a prosecution for knowingly possessing property stolen from a foreign shipment) has been heretofore stated. The Circuit Court of Appeals ruled: (1) The Circuit Court would take judicial cognizance of the fact that shipping documents are signed by executive officers of a vessel only after the cargo is checked, and that the officer is required to sign said documents in the regular course of trade; (2) that actual pos-

session by petitioner need not be established since petitioner was a co-principal with Essig; (3) that the prosecution had properly introduced the Moskowitz statement in evidence after petitioner's counsel had cross examined the witness. Each of such rulings is reviewable by this court under the appropriate statutory provisions noted.

(4) Cases Believed to Sustain the Jurisdiction of this Court.

This court is vested with jurisdiction under the statutory provisions heretofore specified. The cases submitted by petitioner as the basis for the exercise of such jurisdiction to review the judgment below, are cited hereafter in connection with petitioner's reasons for allowance for the writ of certiorari.

C

The Questions Presented

(1) Was a theft of watch movements proved; was there any proof that the watch movements were shipped?

(2) Was the identity of the movements as a part of the merchandise allegedly stolen competently established?

(3) Was possession of the seized movements by petitioner, within the meaning of Section 409, Title 18, U. S. Code, proved?

(4) Was prejudicial error committed in admitting the "Moskowitz statement" requiring a reversal of the judgment?

D

Reasons Relied On for the Allowance of the Writ

(1) In ruling that although the Government had failed to lay a proper foundation for the admission of shipping documents, manifests, and truckmen's records into evidence, the Circuit Court would take judicial notice of the unproved facts in order to supply the missing elements; the Circuit Court decided a question of Federal procedure involving a question of the substitution of an assumption by the learned Court in lieu of proof in conflict with applicable decisions of other Circuit Courts, viz.: *Minor* v. *United States,* 284 Fed. 846; *Beavor* v. *United States,* 3 Fed. (2d) 860.

(2) In ruling that physical possession of the stolen movements by petitioner need not be proven, the Court erred and has raised an important question in the administration of Federal Criminal justice, viz.: *Bollenbach* v. *United States,* 90 Law Edition 318; *Wolf* v. *United States,* 290 Fed. 738; *Chass* v. *United States,* 250 U. S. 655.

(3) In ruling that a statement used by the Government to refresh the recollection of a witness may be placed in evidence by the Government because of cross examination thereon by defendant, the Court raised an important question in the administration of Federal Criminal justice; the Court's decision is in conflict with the decisions of other Circuit Courts, viz.: *Halbert* v. *United States,* 290 Fed. 765; *Ward* v. *United States,* 96 Fed. (2d) 189; *Young* v. *United States,* 97 Fed. (2d) 200; *McCandless* v. *United States,* 298 U. S. 342.

Conclusion

Each of the questions presented is of public importance and raises important questions in the administration of Federal Criminal procedure.

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said United States Circuit Court of Appeals in the cases numbered 36 and entitled on its docket "United States of America, Plaintiff-Appellee, against Hyman Rappy, Defendant-Appellant." to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States and that the judgment of said Circuit Court of Appeals be reversed by this Court and your petitioner prays that the certified copy of the record and proceedings of said Circuit Court of Appeals for the Second Circuit be filed with this petition, may be treated as a return to said writ of certiorari and your petitioner prays that he may have such other and further remedies in the premises as to the Court may seem proper and in conformity with law.

HYMAN RAPPY,
Petitioner,
195 Clinton Street,
New York City.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

HYMAN RAPPY, being duly sworn, deposes and says that he is the Petitioner in the within action; that he has read the foregoing petition and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters, he believes it to be true.

HYMAN RAPPY.

Sworn to before me this
17 day of November, 1946.

WILLIAM ZITO
Attorney and Counselor-at-Law
200 Fifth Ave.
Residing in N.Y.Co.Clk'sNo.3.Reg.No.A41-Z-7
Certificates Filed in
Bx. Co. Clk's No. 1, Reg. No. A24-Z-
Kings Co. Clk's No. 8, Reg. No. A29-Z-7
Commission Expires March 30, 1947

LOUIS H. SOLOMON,
Attorney for Petitioner,
200 Fifth Avenue, New York 10, N. Y.

Supreme Court of the United States

NOVEMBER TERM, 1946

No. .....

HYMAN RAPPY,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S BRIEF

Facts

On the 27th day of March, 1946, petitioner was convicted in the United States District Court for the Southern District of New York of the crime of knowingly possessing goods stolen from a foreign shipment.

The judgment of conviction and sentence was appealed to the United States Circuit Court of Appeals for the Second Circuit, and the judgment was unanimously affirmed on the 6th day of November, 1946 with an opinion rendered by Mr. Justice LEARNED HAND.

This application is made to obtain a review of the decision of the United States Circuit Court of Appeals.

The primary questions presented may be condensed to two points:

(1) That serious prejudicial error was committed in the admission of a narrative hearsay statement, obtained *ex parte,* by an agent of the Federal Bureau of Investigation, in the course of the investigation and preparation of the case. The learned Circuit Court of Appeals condemns the statement as pure hearsay, but sanctioned the admission of the statement on the principle that defendant's cross examination opened the door thereto. This ruling opens the door wide to *post facto,* hearsay statements if the defendant should hazard cross examination as to the authenticity and character of the document. This the petitioner urges is a marked departure from the rules of evidence on the subject of hearsay, and is in conflict with the rules heretofore accepted and recognized and in conflict with the authority of other Circuits.

(2) The second and third questions may be considered together under the point that the Government failed to prove the *corpus delicti,* namely, that the goods had been stolen, and the learned Circuit Court of Appeals sanctioned the deficiency in the proof and supplied a new rule of judicial notice in lieu of proof that the goods were stolen. This, petitioner urges, is likewise a marked departure from established rules.

The goods alleged to have been stolen consisted of watch movements shipped in sealed cartons from Switzerland. The Government introduced the manifest and the bill of lading, issued by the carrier and supplemented this proof by a consular invoice and a cable addressed to the consignee from the shipper and took the position that such proof constituted proof as to what the shipment contained. There was no proof on the part of any person who packed the goods into the cartons or knew the contents of the cartons. The shipping

documents covered the sealed cartons. Petitioner took the position that such proof was insufficient to establish the contents of the cartons as watch movements embracing the goods seized as stolen property. The learned Circuit Court of Appeals justified the absence of proof on the ground that the Court would take judicial notice of trade practices. On this premise the absence of any proof of the contents of the cartons by anyone having knowledge of the contents was dismissed without further justification.

The defendant was sentenced to two years in jail and fined Five thousand ($5000.00) Dollars.

POINT I

Reversible error was committed in the admission of the Moskowitz hearsay statement.

In the investigation and preparation of the case, an agent of the Federal Bureau of Investigation obtained a statement from the Government witness Moskowitz, *ex parte*. On the trial the Government produced the statement to refresh the recollection of its witness, and after cross examination the Government offered the statement in evidence. It was admitted, over objection.

After the jury had retired and was out for three hours, the jury asked for the Moskowitz statement. After the statement was sent in to the jury, a guilty verdict was returned.

Such a statement may be used to refresh a failing recollection (*Putman* v. *U. S.*, 162 U. S. 687; *Nardi* v. *U. S.*, 13 Fed. (2d) 710) or may be used by the adverse party to confront a witness with an earlier contradictory statement, to affect the credibility of the witness (*U. S.* v. *Rosenfeld*, 57 Fed. (2d) 74; *Hickory* v. *U. S.*, 151 U. S. 303).

As a memorandum to refresh recollection, it is not evidence, and will not be admitted, over objection (*Howard* v. *McDonogh,* 77 N. Y. 592; *Humble Oil* v. *Lloyd,* 49 Fed. (2d) 286). As a contradictory earlier statement to attack the credibility of the witness, it is admissible only to attack the credibility—not as proof of the issues in the case—*and when used to affect credibility, then only by the adverse party* to attack credibility, by showing his earlier *ex parte* contradictory statement. (*In re: Gold Mining Co.,* 197 Fed. 126; *In re: Calor,* 185 F. 642.) The government cannot support the credibility of its witness by introducing an earlier *ex parte* statement of the witness (*Humble Oil* v. *Lloyd, supra*).

The offer by the government could have only one or two objectives, to wit: (1) to support the testimony of Moskowitz, shaken on cross examination; or (2) to bolster the credibility of Moskowitz, shaken by cross examination.

For neither of the two objectives is the statement admissible as an exception to the hearsay rule. No foundation was laid for the statement on any theory (*C. M. & St. P. R. R. Co.* v. *Artery,* 137 U. S. 507, 34 L. Ed. 747; *Ayres* v. *Watson,* 132 U. S. 394, 33 L. Ed. 378; *Bennett* v. *Hoffman,* 289 Fed. 797).

The prejudicial effect can be gauged only by the reactions of the jury, in first addressing a request for the statement to the Court after three hours of deliberation and then returning a judgment of conviction after its perusal. As matter of fact the efforts of the district attorney to get the statement in evidence, before it was finally admitted, indicated the weight given the statement by the district attorney. He tried to get defendant's counsel to offer it on more than one occasion in the presence and hearing of the jury (fols. 534, 535) and again at folio 536, and finally offered it himself, over the objection of defendant's counsel (fol. 584).

As matter of fact the learned Circuit Court of Appeals reasons the incompetency of the statement, but justifies the admission of the paper on the ground that defendant cross-examined the witness with respect to it.

The justification of the statement on the ground that defendant had cross-examined the witness with respect to it, is untenable and a grave restriction on cross examination as a test of truth. Such a rule would preclude cross examination to inquire into the authenticity of the paper as a memory refresher, how it was made up, by whom, and all things that detract from the weight of the refreshed testimony, under the peril of having pure hearsay, reduced to writing, admitted in evidence (Wigmore 2d Ed. Vol. 2, Sec. 762, p. 42; *Morris* v. *U. S.*, 80 C. C. A. 112; 149 Fed. 123).

POINTS II and III

There was no proof of the theft of watch movements or of the identity of the seized goods as part of the stolen shipment.

The government made no proof that the watch movements in question were put into a foreign shipment.

The shipper was not produced. No one was produced who could say that the watch movements were delivered to the foreign shipping port. No one was produced who could testify to the contents of the empty cases when put in transit.

The government apparently deemed the shipping documents—the manifest, and the bill of lading sufficient to prove that the goods were received and in transit. And the learned Circuit Court of Appeals sustained the position of the government by resort to "judicial notice".

It is respectfully submitted that the shipping documents may prove at most that the shipping company received "the cartons". It certainly did not prove the contents of the cartons—as watch movements of any particular style or identity. No judicial notice of a trade practice will supply the proof of the contents of the cartons as watch movements without some proof to that effect from the person who packed or shipped the goods or had some knowledge of the contents of the cartons.

The bills of lading cover sealed packages or cartons. The contents were not proved in any manner. Not even the carrier who acknowledges the receipt of the packages could be held accountable for the contents without proof of the contents by someone who shipped, packed or had personal knowledge of the contents (*Mears* v. *N. Y., N. H. & H. RR. Co.*, 75 Conn. 171; 56 L. R. A. 884).

The government sought to amplify its proof by later cable and consular invoice addressed to the office of the consignee,—but these were pure hearsay.

Nor was any proof offered identifying the seized goods as part of the shipment.

In any case of stealing or possessing stolen goods the first element of the proof is proof of the theft—the *corpus delicti*—proof of what the pilfered package contained by the packer or person having knowledge of the contents and identifying the specific goods seized as the goods contained in the pilfered package. No such proof was offered in the instant case. The fact that the crime involved in the instant case involves a foreign shipment obviously does not dispense with proof by the government that the cartons contained watch movements or that the seized goods were part of the contents of such cartons.

POINT IV

Conclusion

It is respectfully submitted that the learned Circuit Court of Appeals erred; that the principles asserted by the learned Circuit Court of Appeals to justify the conviction are contrary to established rules, and are in conflict with the authority in other Circuits and merit review by this Court.

Respectfully submitted,

Louis H. Solomon,
Attorney for Petitioner.

INDEX

CITATIONS

726301—47

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 703

HYMAN RAPPY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 294–298) has not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered November 6, 1946 (R. 299). The petition for a writ of certiorari was filed November 19, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

1. On direct examination a pre-trial written statement of a government witness was used to refresh his memory as to a single fact related in the statement. On cross-examination the witness was interrogated with respect to substantially all of the other matters of fact asserted in the statement for the purpose of showing that they did not constitute the true recollection of the witness but were adopted under suggestion by and fear of the investigating officers. Thereafter, on motion of the Government, the statement was admitted into evidence. The first question presented is whether it was error to admit the statement.

2. The only other question presented is whether there was sufficient proof of the existence of the property alleged to have been stolen.

STATUTE INVOLVED

The Act of February 13, 1913, as amended, 37 Stat. 670, 43 Stat. 793, 47 Stat. 773, 18 U. S. C. 409, provides in pertinent part:

> Whoever * * * shall steal or unlawfully take, carry away, or conceal, or by fraud or deception obtain from any railroad car, station house, platform, depot, wagon, automobile, truck, or other vehicles, or from any steamboat, vessel, or wharf, with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate

> or foreign shipment of freight or express, or shall buy or receive or have in his possession any such goods or chattels, knowing the same to have been stolen; * * * shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both, and prosecutions therefor may be instituted in any district wherein the crime shall have been committed or in which the defendant may have taken or been in possession of the said money, baggage, goods, or chattels. * * *

STATEMENT

On December 28, 1945 (R. 2), a one-count indictment was returned against petitioner and Charles Essig in the District Court for the Southern District of New York, charging that on or about December 4, 1945, they unlawfully and knowingly had in their possession 1,302 Bulova wrist watch movements which had theretofore been stolen while moving as part of a foreign freight shipment from Le Havre, France, to the United States, the defendants knowing that the movements had been stolen (R. 4). Petitioner was tried alone,[1] found guilty (R. 283, 2), and sentenced to imprisonment for two years and to pay a fine of $5,000. On appeal to the Circuit Court of Appeals for the Second Circuit, his conviction was affirmed (R. 299).

[1] Essig pleaded guilty and was sentenced to two years' imprisonment and fined $5,000 (R. 2).

The evidence in support of the Government's case may be summarized as follows:

The Bulova Watch Company of Switzerland, a wholly owned subsidiary of the domestic Bulova Watch Company, manufactures watch movements in Switzerland which it ships via Le Havre, France, to the parent company in New York (R. 144–145). All of the movements manufactured by the Swiss subsidiary are sent to the parent company for use in assembling Bulova watches (R. 141, 144, 163). Such movements (as distinguished from completed Bulova watches) are never sold in bulk to others, and are only sold in isolated cases, singly or a few at a time, to storekeepers who desire to replace a movement damaged beyond repair (R. 141–142). The procedure in shipping movements is for the Swiss subsidiary to prepare quadruplicate consular invoices—for custom purposes—showing what is contained in each carton shipped and indicating the carton markings and numbers in the same fashion as on the bills of lading (R. 144, 148, 154). Copies of these invoices, together with shipping lists showing in detail the contents of each carton (such as the type of movement and type of dial), are forwarded to Bulova's New York offices (R. 144–145). Thereafter, when specific cartons are embarked at Le Havre and the subsidiary is so advised by its agents there, it, in turn, advises the New York office that a

specific shipment is aboard a specific vessel bound for New York (R. 145). A consular invoice and a shipping list were introduced in evidence showing that on November 10, 1945, seventeen cartons, including two numbered 717 and 725, were shipped on the S. S. *Yaka* from Le Havre, as described above, and that cartons 717 and 725 contained 1,500 and 6,400 movements, respectively, with certain identifying markings (R. 7, 154–156). A clerk of the United States Lines, the carrier, also identified for admission into evidence a bill of lading and a ship's manifest, each of which showed that the aforementioned shipment, including cartons 717 and 725, was received on board the S. S. *Yaka* at Le Havre for unshipping at New York (R. 8–12, 17).[2]

The S. S. *Yaka* arrived at New York on November 19, 1945 (R. 7). A United States customs inspector who checked the cargo removed from that ship at New York (R. 23–24) testified that carton 717 could not be found (R. 27) and that carton 725 (which was introduced as an exhibit at the trial) had been so marked by him on arrival as to indicate that it was full and in good condition at that time, but that thereafter, before being removed from the pier, it was found empty (R. 29–31). This testimony was corroborated by a document called a "delivery record book" which

[2] The testimony of this witness described the preparation and distribution of such documents in the regular course of business of the shipper, the carrier, and the customs service.

the carrier regularly maintains to show what consignments have been delivered to truckers for the consignees (R. 18–19). The balance of the above-described shipment (other than cartons 717 and 725) was received by Bulova, and upon checking it was ascertained that the movements were as described in the consular invoice and shipping list (R. 153–154, 16–17). This was the first time during the entire war period that any such quantity of movements was missing; previously, in a few isolated instances, a small number of movements were missing from cartons but never entire cartons (R. 162–163).

On December 4, 1945, about two weeks after the arrival of the S. S. *Yaka,* petitioner, a New York haberdasher (R. 222), telephoned one Moskowitz, a jeweler who was one of his customers, and asked Moskowitz if he wanted to buy some Bulova watch movements which petitioner said were "hot" (R. 170). Later, on December 12, 1945, after petitioner had been arrested for the offense here, he visited Moskowitz at the latter's place of business and told him about his arrest and asked Moskowitz not to tell the F. B. I., if an agent should inquire, that he had offered Bulova movements to him (R. 172–174).

On December 3 or 4, 1945, petitioner also telephoned Charles Weinstein, another jeweler who was one of his haberdashery customers (R. 46–47), and asked him if he could use some Bulova

watch movements (R. 47). Weinstein said he could not, but that a neighbor might and asked petitioner to call him later (R. 47). Weinstein then made arrangements for petitioner to come to his place of business with samples (R. 47). About 10:30 a. m. on December 4, petitioner, accompanied by Essig, arrived at Weinstein's place of business and Weinstein introduced them to a Mr. Toepfer and a Mr. Moss (R. 48–51, 75).[3] As a result of negotiations that day, petitioner and Essig offered to sell Moss, who, unknown to them, was an F. B. I. agent, approximately 1,300 Bulova movements at $10 a movement (R. 52–57, 77–83). Essig stated that payment could not be by check but must be in cash of bills not larger than $100 denomination (R. 54, 78, 227). During the negotiations, Essig stated that petitioner would get $1 of the $10 for each movement sold (R. 53, 78). Moss testified that in response to his question to Essig, in petitioner's presence, whether the movements were stolen or "hot," Essig replied, "You don't have to worry; they were not stolen in the United States. They were stolen in France" (R. 80). Although the room in which the conversation was held was small and the men stood within five feet of each other (R. 79), petitioner denied hearing anything other

[3] Weinstein testified that petitioner told him at the time that he should not have mentioned his (petitioner's) and Essig's names (R. 51).

than the words, "Don't worry * * * they were not stolen in the United States" and the word "France" (R. 231). At the end of these discussions, agents of the F. B. I. arrested petitioner and Essig and took from them and Moss the 1,302 movements (R. 82–83), which were identified at the trial as being of the same style and type as those missing from the *Yaka* shipment (R. 83, 156–161).

ARGUMENT

1. The principal point urged in the petition for a writ of certiorari is that prejudicial error was committed in admitting into evidence a statement (Gov. Ex. 14, R. 287–288) the witness Moskowitz had previously made to the F. B. I. relating the substance of petitioner's offer to sell Bulova movements to him (Pet. 10–13). On direct examination, after Moskowitz had testified as to the substance of his telephone conversation with petitioner, the prosecutor used this statement to refresh Moskowitz's memory as to the fact that petitioner had referred to the movements as being "hot" (which Moskowitz testified meant "stolen" (R. 170–190)) when he offered them to him. That was the only use made of the statement on direct examination. (R. 169–170.) On cross-examination, defense counsel questioned Moskowitz with respect to most of the other parts of his statement (R. 179, 180–181), and also attempted to draw from him testimony to the effect that the word "hot," attributed by him

to petitioner, had in fact been supplied by the F. B. I. agents in preparing the statement, and that and other damaging portions of the statement had been invented by the agents, who then obtained Moskowitz's signature to the statement through fear of possible consequences to him of non-cooperation (see R. 176–186; R. 195–196, 199–207). Thereafter, the Government offered the statement itself in evidence "on the theory that Mr. Segal [defense counsel] is trying to bring out from this witness that the statement was compounded entirely by Mr. Stokes [an F. B. I. agent], and that that portion of the statement was gratuitously put in there by Mr. Stokes. The statement now becomes in issue and the jury should have an opportunity to look at the statement to see if there are any additions, or any interlineations, or any changes after the witness had signed the statement, and that can only be obvious from the context and set-up of the statement" (R. 197). The statement was then admitted (R. 198). The record shows that some of the statement was in Moskowitz's own handwriting and that there were corrections in the typed portion which had been initialed by the witness (see R. 190–191, 207, 287).

After the jury had deliberated for an hour and twenty-five minutes, they requested that the Moskowitz statement be sent in to them (R. 276, 277, 281, 282). Both counsel said this was "satisfac-

tory" (R. 282). About fifty minutes later the verdict was returned (R. 283).[4]

We think it clear that it was not error to admit the statement in evidence. As petitioner admits (Pet. 11), it is, of course, proper to use such a statement to refresh the recollection of a witness. And while it must be conceded that the statement itself is not, because of the hearsay doctrine, normally admissible in evidence, the peculiar circumstances surrounding the examination of Moskowitz with regard to his statement rendered it admissible. The petition asserts that "The offer by the government could have only one or two objectives, to wit: (1) to support the testimony of Moskowitz, shaken on cross examination; or (2) to bolster the credibility of Moskowitz, shaken by cross examination," and that the statement was admissible for neither purpose (Pet. 12). We may concede that the statement was not admissible for these purposes, but we maintain that it was admissible on the ground advanced by the prosecutor when he offered it (see p. 9, *supra*). By his cross-examination of Moskowitz with respect to other parts of the statement than that referred to on direct, and by his attempt to cast doubt on the authorship of the statement, defense counsel raised a new issue in the case. The purpose and

[4] The petition asserts (p. 12) that the jury requested the statement after three hours of deliberation and implies that the verdict was returned shortly after the statement was given the jury. However, the record shows otherwise, as stated in the text.

intended effect of that cross-examination was to implant in the minds of the jurors the idea that this recordation of Moskowitz's dealings with petitioner was in fact fabricated by the F. B. I. agents and was forced on Moskowitz by fear of the consequences to him of failure to cooperate, and that therefore Moskowitz's recollection was not truly being refreshed by his own prior version of the events. Under such circumstances, it was proper for the Government to establish that in truth the memory of the witness was being refreshed by his own authentic past recorded declarations and not by fabrications foisted on him by others. Obviously, the best evidence available for the jury's resolution of that issue created by the defense was the statement itself, which might—as it in fact did—show that Moskowitz was fully conscious of the contents of the statement when he made it and reviewed, corrected, and signed it as his own. See *Buckley* v. *United States,* 33 F. 2d 713, 717 (C. C. A. 6); cf. *Commonwealth* v. *Jeffs,* 132 Mass. 5; *Smith* v. *Jackson,* 113 Mich. 511, 71 N. W. 843. In such a situation, the prior statement is admitted, not for the purpose of establishing the truth of the matters therein asserted, on which basis it is excludable as hearsay, but merely to establish that it is an authentic and proper document from which the memory of the witness could properly be refreshed. Normally, where the latter issue is not raised, there is no reason to permit the jury to see the statement, but where, as here, the

defense has cast a doubt on the authenticity of the past recordation, as the witness' own statement, it cannot complain of the admission of the recordation itself to determine how that doubt should be resolved.

In any event, it is clear from the record that the admission of the statement was not prejudicial. Indeed, defense counsel stated that sending the statement in to the jury after they had retired was "satisfactory" (*supra*, pp. 9–10). The jury deliberated for almost as long a period of time after it had received the statement as before, so that it cannot fairly be inferred that the statement itself was the pivotal point of the jury's verdict. Moreover, by his cross-examination, petitioner in effect brought out all of the vital portions of the statement over and above that portion properly referred to on direct examination. Obviously, therefore, in terms of the matters therein asserted, since nothing was added by the subsequent introduction of the statement in evidence or its perusal by the jury, its admission could not be said to have been prejudicial. Judicial Code, § 269 (28 U. S. C. 391). Cf. *Bullard* v. *United States*, 245 Fed. 837, 839–840 (C. C. A. 4); *Dean* v. *United States*, 246 Fed. 568 (C. C. A. 5); *Garanflo* v. *United States*, 246 Fed. 910 (C. C. A. 8), certiorari dismissed, 251 U. S. 565; *Gregorat* v. *United States*, 249 Fed. 470, 472 (C. C. A. 5); *United States* v. *Dewinsky*, 41 F. Supp. 149, 155–156 (D. N. J.).

2. Petitioner's second and third points are that there was no proof of the theft of watch movements or of the identity of the movements found at the time of arrest as part of the stolen shipment (Pet. 13–14). As shown in the Statement (*supra,* p. 8), however, there is no question of the adequacy of the proof to show that the movements taken at the time of arrest and identified in evidence were part of the *Yaka* shipment alleged to have been contained in cartons 717 and 725. The only question is whether the movements which the consular invoice, bills of lading, and manifest listed as being in those cartons were in fact placed in and shipped in the cartons. Petitioner argues that the contents of those cartons were never properly proved, as, for example, by the testimony of the persons who packed them, and that therefore the theft itself was never proved. We think the court below gave a fair answer to this contention in adverting to the various shipping documents prepared in the ordinary course of business as establishing at least *prima facie* that the contents of the cartons were as indicated therein. (See R. 295–296.) Moreover, the testimony showed that all of the other cartons in the same shipment in which 717 and 725 were included were received by Bulova in good order and, upon checking, their contents were found to be as described in the shipping documents. In addition, the record shows that Bulova movements were never sold

as such in large quantities and that no large number of movements had been lost previous to the *Yaka* shipment. This evidence was, we submit, sufficient to justify the jury in concluding that cartons 717 and 725 when shipped in fact contained the movements as described in the shipping documents, and that the movements taken on the arrests and identified at the trial were from those cartons. Since there was no evidence in rebuttal to cast doubt on this conclusion, the absence of the testimony of those who packed the cartons was not fatal to proof of the theft as charged.

CONCLUSION

The decision below is clearly correct, and the case does not present any conflict of decisions or question of importance. Accordingly, we respectfully submit that the petition for a writ of certiorari should be denied.

GEORGE T. WASHINGTON,
Acting Solicitor General.
THERON L. CAUDLE,
Assistant Attorney General.
ROBERT S. ERDAHL,
SHELDON E. BERNSTEIN,
Attorneys.

JANUARY 1947.

U. S. GOVERNMENT PRINTING OFFICE: 1947